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No. 93-1663

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RANDELL P. MEANS,
Petitioner,

v.

BRENDA CHILCUTT WORTHAM, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This case obviously poses a difficult problem for the United States. In the court of appeals, the Department of Justice condemned the panel's holding against petitioner in categorical terms. Having declined to petition this Court on his behalf, the United States sought to avoid the matter by waiving its right to file a brief as a nominal respondent. After the Court requested a response, the government obtained three extensions of time. Now the Department of Justice tells this Court that there has been a clear error of law and admits that a government attorney's professional reputation has been destroyed by the error. The proper disposition of the petition follows directly from these two conclusions, *viz.*, the petition should be granted, the judgment should be vacated and the matter should be remanded so that the court of appeals can correct the errors in its opinion.

The United States nonetheless opines that the Court need not concern itself with the harmful consequences of the court of appeals' errors solely on the basis of an artificial reading of the opinion below that is at best doubtful and at worst wholly inconsistent with both a common sense and a plain reading of the entire opinion. As we demonstrate below, however, there is no good reason to turn a blind eye to petitioner's situation.

1. The United States agrees (Br. in Opp. 18-21) that the court of appeals committed fundamental legal error by making factual findings never made by the district court. Thus, the United States describes a litany of factual conclusions in the court of appeals' opinion that it agrees are demonstrably and indisputably wrong. Moreover, there can be no disputing that the court of appeals ventured off on its own in making these incorrect factual findings. On the most fundamental factual dispute—whether petitioner hid the Svede log and then lied about it before the district court—the United States clearly states (Br. in Opp. 20-21) that the district court

made *no* finding whatsoever. There is simply no question in this case that the court of appeals exceeded its proper role in reaching factual conclusions on disputed matters that the district court did not resolve.[1]

This case thus presents an extraordinary situation: The court of appeals not only deemed it appropriate to take on the role of the district court—in flat contradiction of settled law from this Court, see, *e.g.*, *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986)—but it erred grievously in discharging its self-appointed role as finder of fact. This process has done immeasurable harm to the reputation of petitioner, an Assistant United States Attorney who has performed more than ten years of public service.

In view of the United States' agreement that the factual conclusions reached by the court of appeals, as well as

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[1] Although the United States agrees (Br. in Opp. 20) that the district court made no findings of intentional misconduct, it nonetheless describes (*id.* at 2-12) at length the proceedings in the district court and several of the district court's most caustic comments. The United States suggests that the district court believed it had ample basis for making such a finding, and refers to some comments made by the court to that effect. Br. in Opp. at 20. But the undisputed fact remains that the district court declined to make any such findings, and resolved the case on the explicit premise that it was *not* making a factual finding of intentional misconduct. *See* Pet. App. 53a. It is worth noting, moreover, that the district court in this case has not in the past shied away from imposing its own views of orderly procedure on the government. *See In re Stone*, 986 F.2d 898 (5th Cir. 1993). It is precisely in this sort of situation that a court of appeals should be loathe to upset the district court's decision not to make a factual finding that will effectively destroy a public servant's career.

As matters stand, however, the district court's decision to refrain from making any factual findings has worked to petitioner's serious disadvantage. Because the court of appeals made factual findings on its own, petitioner is left in the position of seeking this Court's intervention if he is to have any meaningful review of the facts found against him. Given that the findings made by the court of appeals are demonstrably wrong, to deprive petitioner of any review of those findings is particularly unjust. *See* Fed. R. Civ. P. 52(a).

the process that led to them, were fundamentally wrong, petitioner expected the Department of Justice to support his effort in this Court to restore his reputation. That expectation was reinforced by several additional factors: First, two leading groups of prosecutors, the National Association of Assistant United States Attorneys and the Federal Bar Association, filed *amicus* briefs in support of the petition, urging summary reversal to protect their professional interests. Second, 403 Department of Justice attorneys from all over the country were concerned enough about petitioner's plight to file in their individual capacities an *amicus* brief in support of the petition. The remarkable effort highlights the widespread perception by government lawyers that courts are increasingly and unjustifiably quick to conclude that government counsel have engaged in misconduct. It is just an accident of circumstance that petitioner, and not one of his *amici*, is before this Court with his reputation unjustly destroyed.[2] In light of these factors—as well as the strong view of the merits of this case previously expressed by the Department of Justice in the court of appeals (see Pet. App. 121a-33a), and the incalculable harm caused to petitioner by the court of appeals' plain legal error—the proper course would have been for the United States to urge that the error be recognized, the judgment vacated and the matter remanded to the court of appeals.

2. The United States, however, filed a brief opposing petitioner's effort to get back his good name. The willingness of the Department of Justice to blind itself to a fundamental error destroying the reputation of one of its

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[2] It is fair to say that the United States' brief in this case will provide little comfort to the rank and file attorneys who litigate on its behalf every day and who fear that petitioner's fate—caused essentially by the failure of his client's representative, Mr. Svede, to recall in a timely fashion the existence of an innocuous document that no rational person would seek to hide—could befall them at any time. The United States fails even to acknowledge the *amicus* briefs filed on petitioner's behalf, much less to address the concerns expressed in those briefs over the impact of the decision below on government litigators generally.

lawyers is disappointing. But even more disturbing is the unpersuasive reasoning adopted by the United States.

The United States argues (Br. in Opp. 21-22) that the court of appeals did not rest its affirmance of the non-reimbursement sanction against petitioner on its incorrect factual finding that petitioner engaged in willful misconduct, and that the factual errors in the opinion below therefore were in effect "harmless," *i.e.*, made no difference in the resolution of the legal issue before this Court. The United States argues that the devastating harm to petitioner's reputation inflicted by the court of appeals somehow does not count because the court's findings concerning his supposed intentional misconduct were made solely in the course of affirming the separate sanctions imposed by the district court against the United States. See Br. in Opp. 22-24. Not only does this analysis elevate form over substance, but it also cannot be squared with the holding below.

a. Even on the face of the court of appeals' opinion, it is not true that the court made its factual findings with respect to petitioner's supposed intentional misconduct only with respect to the sanctions against the United States. First, the court of appeals described its findings concerning petitioner's "misconduct" in its general description of the case. See Pet. App. 2a, 9a & n.13. Moreover, the court of appeals' discussion of the basis on which it upheld petitioner's sanction is at best murky. It is clear, however, that the court condemned petitioner for his "flagrant disregard of his discovery obligations." Pet. App. 27a n.35. This is the same language that the court of appeals twice used in the earlier portion of the opinion in finding that petitioner intentionally misled the district court. Pet. App. 10a. Moreover, as the court of appeals' citation to the district court record, see *id.*, suggests, this phrase had its genesis in the trial judge's opening remarks at the July 28 hearing, where the court expressed concern about its suspicion that petitioner concealed the Svede log, and termed this a "rather flagrant violation of

the discovery obligations." Pet. App. 53a.[3] Nonetheless, the United States urges (Br. in Opp. 25 n.8) a more benign interpretation of the court of appeals' opinion. It asserts that the court of appeals' discussion should be read as merely reflecting petitioner's failure to respond timely to discovery requests.

The government's submission is completely untenable when analyzed with respect to the court of appeals' discussion rejecting petitioner's separation of powers argument. In rejecting the argument that the non-reimbursement sanction improperly interfered in internal Department of Justice matters, the court of appeals relied upon the inherent power of the federal courts to punish *contempt* and specifically noted the historic power of the courts "to punish *willful* infractions" offending the authority of the courts. Pet. App. 28a & n.38 (emphasis added). To accept petitioner's argument, the court of appeals stated, would rob the federal courts of these historic powers when dealing with government attorneys. Pet. App. 27a-28a.

If the court of appeals was not relying on its findings of intentional misconduct in affirming the non-reimbursement sanction against petitioner, there was no reason to rely upon, or even mention, the power of the federal courts to punish willful contempt of court. In fact, however, there was good reason for the court to address the inherent powers of the federal courts. The July 28 order of the district court requiring petitioner to pay plaintiff's counsel the costs of attending the show cause hearing and not to seek reimbursement of those costs was based on the court's inherent powers.[4] Under settled law, a trial

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[3] We reiterate that the district court, despite its initial concern, declined to make any finding at the end of the proceedings that petitioner engaged in intentional misconduct of any sort.

[4] Prior to the July 28 hearing, it was at least ambiguous whether the district court was relying on Fed. R. Civ. P. 37 as the source of its authority for its various sanctions orders, or whether it was also relying on its inherent powers. In the July 1 order setting the hearing to show cause, however, the district court plainly adverted

court finding that "counsel's conduct . . . constituted or was tantamount to bad faith . . . would have to precede any sanction under the court's inherent powers." *Roadway Express, Inc.* v. *Piper*, 447 U.S. 765, 767 (1980). See also *Resolution Trust Corp.* v. *Bright*, 6 F.3d 336, 340 (5th Cir. 1993); *Matter of Thalheim*, 853 F.2d 383, 389 (5th Cir. 1988). When faced with bad faith conduct by government lawyers, the court of appeals held, the separation of powers cannot impede the courts' historic inherent power to punish intentional wrongdoing. Pet. App. 28a-29a. Thus, when the opinion is understood in context, there is no question that the court of appeals affirmed petitioner's non-reimbursement sanction because *it* found that petitioner acted intentionally.

b. In the end, the United States urges on this Court a view of the court of appeals' conduct in this case that is simply unreasonable. The United States agrees that the court of appeals made improper factual findings, and that those factual findings formed the basis for affirming the sanctions against the United States. Br. in Opp. 22-23. In affirming the sanctions against petitioner, however, the United States takes the view that the court of appeals completely shifted gears and relied exclusively on the district court's conclusion that petitioner was late and sloppy with his discovery responses. For the court of appeals to affirm the non-reimbursement sanction in the manner posited by the United States, it would have had to disregard the briefs and arguments of the Department of Justice, which focused on the district court's failure to find the willful misconduct that was the necessary predicate to support the sanctions against *both* petitioner and the United States. See Brief for Appellants 19-24, 33-42

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to its inherent powers, and did not mention Rule 37. Pet. App. 51a-52a. The July 28 order entering a new non-reimbursement sanction against petitioner did not mention Rule 37 or any other explicit source of authority, no doubt because judgment had been entered and discovery was no longer at issue. The only source of authority for that order was the district court's inherent powers.

(5th Cir. No. 92-1668).[5] The court of appeals would also have had to flout settled law requiring a finding of bad faith to support the non-reimbursement sanction. And it would have had to do this immediately after affirming the sanctions against the United States based on its factual conclusion, stated in the most severe terms possible, that petitioner intentionally withheld documents and then lied to the district court in an effort to cover up his treachery. Contrary to the submission of the United States, it is simply unrealistic to think that the court of appeals took no account of those findings of misconduct in affirming the sanctions against petitioner.

3. In any event, the effort of the United States to avoid the problem in this case by advancing a hypertechnical and artificial reading of the court of appeals' opinion is beside the point. As we indicated in the Petition (Pet. 18 n.11, 23-24), even putting aside the non-reimbursement sanction, the harm to petitioner's reputation caused by the court of appeals' factual findings provides a sufficient basis for reversal of the opinion below. Indeed, the Department of Justice itself emphasized before the court of appeals that the harm caused to petitioner's reputation by the factual misstatements in the opinion provided an independent basis for altering the opinion. See Pet. App. 122a-23a, 131a.

In this Court, however, the United States suggests (Br. in Opp. 22 n.4) that there is some uncertainty over whether petitioner has standing to challenge the decision below on the ground that it harms his reputation, and

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[5] It is not surprising that the court of appeals chose to resolve the intentional misconduct point in the portion of its opinion dealing with the sanction against the United States, since the Department of Justice's brief made the argument that no intentional misconduct occurred solely in the context of arguing that the sanctions against the United States were unduly severe. In the portion of the brief dealing with petitioner's non-reimbursement sanction, the Department of Justice took as a premise that no intentional misconduct occurred and was content simply to refer to the earlier discussion in its brief. *See* Brief for Appellants 33-42.

that summary reversal to correct the conceded and egregious errors of the court of appeals is unwarranted. In the first place, it is beyond dispute that the $625 sanction levied *after* the July 28 hearing had nothing to do with petitioner's initial failure to respond adequately to plaintiffs' discovery requests; as we have noted, that sanction had to be based on the district court's inherent authority, and petitioner undoubtedly has standing to challenge the court of appeals' affirmance of the sanction based on its own factual findings of intentional misconduct.[6] But even if that were wrong, petitioner is nonetheless fully entitled to challenge the decision below solely on the basis of the harm done to his reputation.[7]

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[6] The United States contends (Br. in Opp. 25) that the "district court clearly did not base" its non-reimbursement order with respect to the $625 sanction "on any facts or assumptions concerning intentional misrepresentations by petitioner," and asserts that "the court of appeals understood that fact." That is precisely our point: The district court failed to make any findings of intentional misconduct; in the absence of those findings, and in order to uphold the sanction against petitioner, *the court of appeals simply made the necessary findings on its own*; and it is that improper process that petitioner challenges in this Court. It is plain, in any event, that the $625 sanction is ample basis to provide the injury required to sustain his petitioner's standing.

[7] Because the United States fails to cite any authority in support of its view, it is unclear what it sees as the nature or source of uncertainty over petitioner's standing. As we show below, there is no doubt on these facts that petitioner meets both the constitutional and statutory tests for standing. Although some courts have refused to permit attorneys to appeal decisions on the ground of reputational harm, *see, e.g., Bolte* v. *Home Ins. Co.*, 744 F.2d 572 (7th Cir. 1984), those decisions were based on the ground that mandamus, and not appeal, was the appropriate procedure to follow for an attorney who was not a party to the proceedings and whose only part in the case was to be criticized in an opinion that was not otherwise appealable. *Cf. Penthouse Int'l, Ltd.* v. *Playboy Enterprises*, 663 F.2d 371 (2d Cir. 1981) (granting aggrieved attorney right to intervene as a party on appeal). In this case, petitioner's statutory standing was unchallenged below, and there is no doubt that he is properly before this Court as a party. Nor have we found authority to the effect that injuries to an attorney's reputation cannot form the basis for Article III standing. Although the

First, it is clear that "published opinions chastising [counsel] by name" constitute a "serious sanction." *United States* v. *Isgro*, 974 F.2d 1091, 1099 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1581 (1993). See also Pet. 18 n.11; William W. Schwarzer, *Sanctions Under the New Federal Rule 11—A Closer Look*, 104 F.R.D. 181, 201 (1985) (judges should recognize that "public criticism delivered from the bench" can "damage a lawyer's reputation and career"). As a common sense matter, it is not difficult to see that the factual findings made by the court of appeals have caused petitioner injury and that a reversal by this Court would redress that injury. Thus, petitioner meets the constitutional requirements for standing. See *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

Nor is there any doubt that, as a statutory matter, petitioner is properly before this Court as a party. Petitioner was a party to the appeal under 28 U.S.C. § 1291, and the propriety of his party status has never been challenged at any point. As a party to the case, he is plainly entitled to seek certiorari in this Court pursuant to 28 U.S.C. § 1254.

In short, this Court is fully empowered to reverse the decision below on the ground that its improper factual findings have grievously harmed petitioner's reputation.

4. As we have demonstrated, the submission of the United States is at odds with the court of appeals' opinion on its face, and with any realistic view of the decision-making process below. Indeed, there is something of an Alice-In-Wonderland flavor to the government's position—urging this Court not to concern itself with the errors

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Seventh Circuit has suggested that speculative harm to an attorney's reputation is not a sufficient injury, *see Clark Equip. Co.* v. *Lift Parts, Mfg. Co.*, 972 F.2d 817 (7th Cir. 1992), even that court recognizes that an opinion that is "in substance or tone, of an inherently injurious nature," can provide the concrete harm necessary to establish standing. *Barnhill* v. *United States*, 11 F.3d 1360, 1371 (7th Cir. 1993). *See also Clark*, 972 F.2d at 820.

committed below because they made no difference to the outcome of petitioner's case, even though any cursory examination of the opinion readily reveals the egregious harm the opinion has in fact caused petitioner.

We can only reiterate that this is an extraordinary case of fundamental legal error. Petitioner has been found guilty, by a procedure that this Court condemned in *Icicle Seafoods, supra,* of withholding documents and conspiring with a Postal Service employee to cover up the deceit. The opinion below should be vacated, and the case should be remanded to the court of appeals for it to decide—without engaging in appellate fact-finding—whether the non-reimbursement sanction against petitioner can stand in the absence of a finding of intentional misconduct by the district court. Summary reversal is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals should be summarily reversed.

Respectfully submitted,

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